OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

July 22, 2003

Mr. Don Rogers
Communications Director
Texas Department of Mental Health and Mental Retardation
P.O. Box 12668
Austin, Texas 78711-2668

OR2003-5045

Dear Mr. Rogers:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 184636.

The Texas Department of Mental Health and Mental Retardation (the "department") received a request for ten categories of information related to the employment of a named individual at Terrell State Hospital. You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with federal and state law.[1] We have considered the exception you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You claim that the submitted information is not subject to release pursuant to regulations promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), and that the information is therefore excepted from disclosure under section 552.101 of the Government Code in conjunction with these regulations. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually

[1] You have not provided information responsive to all categories of the request. To the extent such information exists, we presume you have released it to the requestor. If you have not, you must do so at this time. *See* Gov't Code §§ 552.301, .302.

Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164; *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. Pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

Section 160.103 defines a covered entity as a health plan, a health clearinghouse, or a health care provider who transmits any health information in electronic form in connection with a transaction covered by subchapter C, Subtitle A of Title 45. 45 C.F.R. § 160.103. In this instance, the department explains that it is a health care provider for purposes of section 160.103. Therefore, we will next determine whether the submitted information is confidential as protected health information under the federal law.

Section 160.103 of title 45 of the Code of Federal Regulations defines the following relevant terms as follows:

Health information means any information, whether oral or recorded in any form or medium, that:

> (1) Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health clearinghouse; and
>
> (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.

Individually identifiable health information is information that is a subset of health information, including demographic information collected from an individual, and:

> (1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
>
> (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and
>
> (i) That identifies the individual; or

(ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

Protected health information means individually identifiable health information:

(1) Except as provided in paragraph (2) of this definition, that is:

(i) Transmitted by electronic media;

(ii) Maintained in electronic media;

(iii) Transmitted or maintained in any other form or medium.

45 C.F.R. § 160.103. You contend that the submitted information constitutes individually identifiable protected health information. Upon review of the information, we agree that, with the exception of Exhibits L through Q, it is protected health information as contemplated by HIPAA. However, we note that a covered entity may use protected health information to create information that is not individually identifiable health information, i.e., de-identified. 45 C.F.R. § 164.502(d)(1). The privacy standards that govern the uses and disclosures of protected health information do not apply to information de-identified in accordance with sections 164.514(a) and (b) of the Code of Federal Regulations. 45 C.F.R. § 164.502(d)(2).

Under HIPAA, a covered entity may determine that health information is not individually identifiable only under certain circumstances. One method requires a person with specialized knowledge of generally accepted statistical and scientific principles and methods for rendering information de-identifiable to apply and document such methods and principles to determine that release of protected health information would result in a very small risk of individual identification. *See id.* § 164.514(b)(1). The other method requires the covered entity to meet the following two criteria: (1) remove specific identifiers, including but not limited to names, dates directly related to an individual, telecommunication numbers, vehicle identifiers, and any other unique identifying number, characteristic, or code, and (2) have no actual knowledge that the information could be used alone or in combination with other information to identify an individual who is a subject of the information. *See id.* § 164.514(b)(2)(i), (ii). We have marked the specific identifiers in the submitted protected health information. *See id.* § 164.514(b)(2)(i)(A)-(R). To the extent that the department has no actual knowledge that the de-identified information could be used alone or in combination with other information to identify the subject of the health information, the department must withhold the information that we have marked in Exhibits B through K and R through U under section 552.101 of the Government Code in conjunction with HIPAA. However, if the department has actual knowledge that the de-identified information could be used alone or in combination with other information to identify the subject of the health

information, then the department must withhold Exhibits B through K and R through U in their entirety under section 552.101 of the Government Code in conjunction with HIPAA.

The department also contends that the submitted information is confidential under section 552.101 in conjunction with other law. Because HIPAA may not require the department to withhold all of the submitted information, we also must consider the applicability of the additional statutory provisions on which the department relies. We note that HIPAA generally preempts a contrary provision of state law. *See* 45 C.F.R. § 160.203. For purposes of HIPAA, "contrary" means the following:

> (1) A covered entity would find it impossible to comply with both the State and federal requirements; or
>
> (2) The provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of part C of title XI of the Act or section 264 of Pub. L. 104-191, as applicable.

Id. § 160.202. The department contends that the submitted information is made confidential under section 611.002 of the Health and Safety Code, section 159.002 of the Occupations Code, and section 711.601 of title 40 of the Texas Administrative Code. As discussed below, section 611.002 of the Health and Safety Code, section 159.002 of the Occupations Code, and section 711.601 of title 40 of the Texas Administrative Code are applicable to some of the information that we have de-identified under HIPAA. We find that, in this instance, it is not impossible for the department to comply with both HIPAA and the listed confidentiality provisions. We likewise find that these confidentiality provisions do not stand as obstacles to the accomplishment and execution of the full purposes and objectives of HIPAA. Therefore, we do not determine here whether HIPAA preempts section 611.002 of the Health and Safety Code, section 159.002 of the Occupations Code, or section 711.601 of title 40 of the Texas Administrative Code.[2]

We first note that some of the submitted information is confidential under the Medical Practice Act (the "MPA"). Occ. Code §§ 151.001-165.160. Section 159.002 of the Occupations Code provides in pertinent part:

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[2] We note that the requestor has asserted a right of access to the medical records under section 159.003 of the Occupations Code. However, neither the requestor nor the department has demonstrated that such a right of access exists in this instance. Therefore, we do not determine whether section 159.003 is preempted by HIPAA in this ruling. We note that HIPAA provides that state law that is contrary may not be preempted in some situations, including where state law is more stringent than HIPAA. *See* 45 C.F.R. § 160.203.

> (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
>
> (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Information subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). For your convenience, we have marked the documents that are medical records and must be withheld under the MPA.

We next note that the submitted information contains mental health records, which are governed by chapter 611 of the Health and Safety Code. Chapter 611 provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) provides:

> Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Health & Safety Code § 611.002. Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001. We have marked the mental health records that are confidential under section 611.002 and must be withheld under section 552.101.

You contend that Exhibits G and H are confidential under section 552.101 of the Government Code in conjunction with section 40.005 of the Human Resources Code and section 711.601 of title 40 of the Texas Administrative Code. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 40.005 of the Human Resources Code provides statutory authority for the Department of Protective and Regulatory Services ("DPRS") to promulgate rules regarding release of DPRS's records. In pertinent part it reads:

> (a) The department shall establish and enforce rules governing the custody, use, and preservation of the department's records, papers, files, and communications.
>
> (b) The department shall prescribe safeguards to govern the use or disclosure of information relating to a recipient of a department service or to an investigation the department conducts in performing its duties and responsibilities. The safeguards must be consistent with the purposes of the department's programs and must comply with applicable state and federal law and department rules.

You contend that section 711.601 of title 40 of the Texas Administrative Code applies to Exhibits G and H and makes them confidential. Section 711.601 applies to investigations of department facilities by DPRS and provides that "[t]he reports, records, and working papers used by or developed in the investigative process, and the resulting investigative report, are confidential and may be disclosed only as allowed by law or this chapter." Exhibits G and H are DPRS investigative reports of a department facility. Therefore, you must withhold Exhibits G and H under section section 552.101 of the Government Code in conjunction with 711.601 of title 40 of the Texas Administrative Code. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976); *see also* Open Records Decision No. 594 (1991). However, there is no indication that Exhibits L through Q were used or developed in a DPRS investigation. Therefore, Exhibits L through Q may not be withheld under section 711.601 of title 40 of the Texas Administrative Code.

In summary, to the extent that the department has no actual knowledge that the de-identified information in Exhibits B through K and R through U could be used alone or in combination with other information to identify the subject of the information, the department must withhold the information that we have marked in Exhibits B through K and R through U under section 552.101 of the Government Code in conjunction with HIPAA. If the department has actual knowledge that the remaining information in these exhibits could be used alone or in combination with other information to identify the subject of the information, then the department must withhold all of the information in Exhibits B through K and R through U under section 552.101 in conjunction with HIPAA. If HIPAA does not require the department to withhold all of the information in Exhibits B through K and R through U, then the department must withhold both the marked information in those exhibits that is confidential under HIPAA and the other marked information that is confidential under section 552.101 of the Government Code in conjunction with the MPA, section 611.002 of the Health and Safety Code, and section 711.601 of title 40 of the Texas Administrative Code. If HIPAA does not require the withholding of the remaining information, then the department must release that information. As we are able to make these determinations, we need not address your other arguments against disclosure.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

Jennifer E. Berry

Jennifer E. Berry
Assistant Attorney General
Open Records Division

JEB/seg

Ref: ID# 184636

Enc: Submitted documents

c: Mr. Mark S. Kennedy
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(w/o enclosures)